IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

NO. 77-333

JAMES W. WELLHAM, an individual, CHANNING-HAMILTON CORPORATION, a corporation,

Petitioners,

v.

UNION BANK, a banking corporation, CITIZENS AND SOUTHERN NATIONAL BANK, a banking corporation, SECURITY PACIFIC NATIONAL BANK, a banking association, CROCKER NATIONAL BANK, a banking association, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, a banking association, CENTURY BANK, a banking association, EUGENE HARTER, an individual, MARC WEISMAN, an individual, STEVEN FRIED, an individual, RICHARD DOMINGUEZ, an individual, DOES I through X, inclusive,

Respondents.

(CITIZENS AND SOUTHERN NATIONAL BANK, real party in interest)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE STATE OF CALIFORNIA, NINTH CIRCUIT

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TOPICAL INDEX

TOPICAL INDEX (Continued)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Continued)

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, JAMES W. WELLHAM and CHANNING-HAMILTON CORPORATION, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 3, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's petition for rehearing is unreported and is set forth in the Appendix, infra, at p. 1a. The opinion of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's appeal from the United States District Court for the Central District of California is unreported, and is set forth in the Appendix, infra, at p. 1a. The opinion of the United States District Court for the Central District of California is unreported, and is set forth in the Appendix, infra, at p. 2a.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on May 3, 1977. The timely petition for rehearing was denied on June 3, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER A UNITED STATES DISTRICT COURT ORDER GRANTING

A CHANGE OF VENUE MAY BE REVIEWED BY APPEAL.

2. WHETHER THE VENUE PROVISIONS OF THE CLAYTON ACT, 15 U.S.C. §22, TAKE PRECEDENCE OVER AND SUPERSEDE THE VENUE PROVISIONS OF THE NATIONAL BANKING ACT, 12 U.S.C. §94, THEREBY ENABLING ANTITRUST ACTIONS TO BE BROUGHT AGAINST A NATIONAL BANKING ASSOCIATION IN THE FEDERAL JUDICIAL DISTRICT WHERE THE UNLAWFUL ACT OCCURRED.

STATUTES INVOLVED

28 U.S.C. §1291: Final Decisions of District Courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

12 U.S.C. §94: Venue of Actions

> Suits, actions and proceedings against any association under this title [National Banks] may be had in any district, or Territorial court of the United

States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. §15: Suits by Persons Injured; Recovery of Treble Damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §22: District in which to Sue Corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT OF THE CASE

This action was commenced on February 24, 1976, by the Plaintiffs against six banking associations and four named individuals who have been charged with conspiracy to boycott and restrain trade, defamation, interference with contractual relationships, and inducing the breach of contractual relationships. All of the wrongful acts were alleged to have taken place in the Central District of California. Citizens and Southern National Bank, one of the Defendants herein, timely motioned to have the action, insofar as it pertains to Citizens and Southern National Bank, transferred to the United States District Court for the Southern District of Georgia, its home district, by virtue of the venue provisions of the National Banking Act, 12 U.S.C. §94. By agreement with the Plaintiffs, Defendant Crocker National Bank has not yet answered the complaint, pending the final determination of the issue of appropriate venue in this litigation. If the venue provisions of the National Banking Act are found to take precedence over and supersede the venue provisions of the Clayton Act, 15 U.S.C. §22, Crocker National Bank will make a motion to have venue transferred to the United States District Court for the Northern District of California, its home district.

Plaintiffs vigorously opposed the motion of Citizens and Southern National Bank to transfer the action, and on July 14, 1976, the United States District Judge ordered the action, insofar as it pertains to Citizens

and Southern National Bank, transferred to the United States District Court for the Southern District of Georgia.

Plaintiffs filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit on July 19, 1976, seeking an order staying the transfer of the action and denying the motion of Citizens and Southern National Bank. Upon due consideration, the petition was denied on August 9, 1976. Thereafter, on January 6, 1977, Plaintiffs filed an appeal in the United States Court of Appeals for the Ninth Circuit alleging that the District Court order granting the change of venue was an appropriate order to be reviewable on appeal, and that the venue provisions of the Clayton Act take precedence over and supersede the venue provisions of the National Banking Act in an antitrust action brought against a national bank. Citizens and Southern National Bank filed a timely motion to dismiss the appeal for lack of appellate jurisdiction, and Plaintiffs filed a response to said motion to dismiss. On May 3, 1977, the United States Court of Appeals for the Ninth Circuit entered its order dismissing Plaintiff's appeal. A timely petition for rehearing was filed and denied.

REASONS FOR GRANTING THE WRIT

Antitrust actions enjoy a position of great importance in the free enterprise system, and a Plaintiff's choice of venue is often crucial to the outcome of the matter. "Unless the balance is strongly in favor of

the defendant, the plaintiff's choice of forum should rarely be disturbed." Crawford Transport Co. v. Chrysler Corp., 191 F.Supp. 223, 228 (E.D. Ky. 1961); Hills, Antitrust Advisor, §12.51, p. 600 (1971).

"The purpose of the antitrust venue statute is to permit a Plaintiff to seek damages on his home ground." Hills, Antitrust Advisor, §13.20, p. 659 (1971). The purpose of the Clayton Act §12 (15 U.S.C. §22), is to permit the injured person to sue in his own district rather than in a distant district in which a foreign corporation resides or can be found. "In framing §12 to include those districts at the plaintiff's election, Congress thus had in mind not only their convenience, but also the defendant company's inconvenience." United States v. National City Lines, Inc., 334 U.S. 573, 588 (1948).

The denial of Plaintiff's choice of venue is a final order within 28 U.S.C. §1291 since the Plaintiffs will lose finally and irreparably the right to have the venue question litigated at the only time it has any legal significance to the parties. Litigation of the venue question at a later stage of the proceeding will render the issue moot. In the language used by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949):

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral

to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

A. A UNITED STATES DISTRICT COURT ORDER GRANTING A CHANGE OF VENUE IS A FINAL ORDER.

The problem in this case is whether the circumstances presented establish an exception to the general rule that a court order transferring jurisdiction of an action is an interlocutory order, and therefore nonappealable under 28 U.S.C. §1291.

An exception to the general rule was recognized by this Court in 1948 in Cohen v. Beneficial Industrial Loan Corp., supra where significant inroads on the historic federal policy governing interlocutory appeals were made. The Court, per Justice Jackson, considered the appealability of a District Court order denying Defendant's motion to compel the Plaintiffs to comply with a state regulation concerning security for costs in a stockholder's derivative suit, and held at 337 U.S. 546, that

"Nor does the statute [28 U.S.C §1291] permit appeals, even from fully consumated decisions, where they are but steps towards final

judgment in which they will merge. . . But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. . . This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied. . ."

The Court recognized that appellate review of a collateral matter at a later date would be an empty right, and thus 28 U.S.C. §1291 should be construed so as not to deny effective review of a claim fairly severable from the context of a larger litigation process.

The effect of denying review will result in a trial of a conspiracy to boycott trade in three different jurisdictions on opposite ends of the continent. Crocker National Bank, one of the ten Defendants named herein, is also a National Banking Association which, if it can avail itself of the venue provisions of the National Banking Act, can have itself severed from all other Defendants and the

case against it transferred for trial to the Northern District of California. As a consequence, Plaintiffs will be compelled to prosecute their causes of action against the Defendant Citizen and Southern National Bank in the United States District Court for the Southern District of Georgia, against Defendant Crocker National Bank in the United States District Court for the Northern District of California, and against all other defendants in the United States District Court for the Central District of California.

As a result Plaintiffs will undoubtedly be compelled to prosecute their causes of action against the ten Defendants in three different United States District Courts, all of said prosecution occurring before Plaintiff's rights to challenge the validity of any venue transfer order accrues to them.

B. THE DECISION OF THE COURT OF APPEALS DENYING APPEAL IS INCONSISTENT WITH DECISIONS OF THIS COURT.

In addition to being contrary to the congressional intent behind 28 U.S. §1291, the decision adopted by the Ninth Circuit Court of Appeals in this case is inconsistent with its previous decision in Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (1968), and this Courts decision in Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) and Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950).

// //

This Court demonstrated its commitment to giving 28 U.S.C. §1291 a liberal interpretation by permitting the appeal of an order changing venue in Mercantile National Bank. The order issued there was quite similar to the order issue by the District Court in this case, and the Court held that, based upon the ruling in Cohen, an order changing venue was appealable because it was a separate and independent matter and not enmeshed in the factual and legal issues surrounding the cause of action of Plaintiff. This is, of course, the same reasoning that the Ninth Circuit should have followed, but failed to. The result is that the policy of finality expressed in 28 U.S.C. §1291 is frustrated because the Petitioner here will be subjected to long and complex litigation in distant forums which all may be for naught if consideration of the preliminary question of jurisdiction is postponed until the conclusion of the proceedings at trial.

The rule of Cohen was extended in Swift & Co. Packers, when Justice Frankfurter held that an order vacating attachment was reviewable on appeal, although the litigation had not run its entire course, because the right asserted was too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Anything short of hearing the issue at that time would have been theoretically possible but an empty right. Moreover, "the provision for appeals only from final decisions in 28 U.S.C. §1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process". 339 U.S., at 689.

In Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (1968) the Ninth Circuit recognized the hopeless position a Plaintiff would be in if a court issues an order changing venue and an appellate court would not review the order until after a trial on the merits. Acknowledging the venue provisions deal with rights too important to be denied review, and that they cannot be effectively remedied on appeal from a final judgment, the Court considered the merits of the transfer order. It stated that

> "The purpose of the rule (28 U.S.C. §1291) is to avoid the disruption, expense, and inconvenience parties and witnesses must suffer by having a trial in an improper forum. To require litigants to await final judgment for relief serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them." 403 F.2d at 952.

These decisions represent this Court's, and the Ninth Circuit's, efforts to effect the intent of Congress to permit review of orders which cannot be effectively remedied on appeal from a final judgment and which pertain to collateral and separable matters from the main action. The failure to follow these decisions jeopardizes the foundation upon which those decisions rest and upon which future case must be decided.

C. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE CONGRESSIONAL PURPOSES UNDERLYING THE NATIONAL BANKING ACT.

The National Banking Act was originally passed in 1864 and was amended in 1873. At that time, communications between localities were laborious and slow, mechanical and photographic means of copying documents were not yet in existence, banks were much smaller business entities than today, and litigation against a bank in any district other than its own district could prove burdensome and expensive to the bank.

> "In 1914 a 'great majority of [commercial-banking corporations] had only a single office, most of the branch banks that did exist operated only a few offices, and none was more than statewide in scope'. In 1900, of the some 8,700 banks in the United States, only 87 had more than a single office; even in 1920, only 530 of the 30,000 odd banks in the United States had branches." Chandler, The Economics of Money and Banking 151, 156 (4th ed. 1964), quoted in Note, An Assault On The Venue Sanctuary Of National Banks, 34 Geo. Wash. L. Rev. 765, 769 N. 34 (1966).

Originally the purpose of the National Banking Act was to create a sound currency system. The Civil War created a sudden emergency need for enormous funds to finance the Union troops, and since state banks were not equiped to meet this need, a strong, uniform federal system was needed. The pressure of the War made the stability of these new national banks a matter of national security.

The circumstances surrounding the venue provisions of the National Banking Act were intended by Congress to meet a specific and temporary need. Today, rapid communications, wide availability of copying devices, and large corporate multi-branch banks create a far different scenario than that which existed in 1864. Instead, today, litigation against a national bank, especially anti-trust litigation, only in the home district of a bank proves burdensome and expensive to a Plaintiff who is not a resident of the same district, both because of the distance between the forum district and the home district, and the prejudice of local citizens for the local bank and against the non-local Plaintiff. See, e.g., Staley v. Homeland, Inc., 368 F.Supp. 1344 (E.D. N.C. 1974).

Congress was well aware that branch banking was not an established practice and that banks did very little, if any, general business outside their counties where originally chartered. 75 Cong. Rec. 9890, 9893 (1932) (remarks of Senator Glass), 76 Cong. Rec. 2090 (1933) (remarks of Senator Fletcher) 76 Cong. Rec. 2206 (1933)

(remarks of Senator Vandenburg). It was therefore not unreasonable to limit suits against national banks to the place where they conducted all their business.

National banks were not even permitted to establish branch banks within their charter location until the passage of The McFadden Act of 1927, 44 Stat. 1228, as amended, 12 U.S.C. §36 (1964), thereby creating a need for a redefinition of "location" in 12 U.S.C. §94. This redefinition has never materialized.

Congress never envisioned national banks as conducting business in more than one location, that is, as being "established" in more places than its charter location, until the congressional amendment in 1933 of section 7, which allowed national banks to establish branches beyond their charter location. The Courts have similarly not grasped the opportunity to interpret the history and meaning of 12 U.S.C. §94 to meet todays necessary, and inescapable conclusion, that the special venue provisions of the National Banking Act no longer serve their intended purpose. Instead, the Courts have relied on hoary decisions based upon an outmoded interpretation of the purposes of the act. The leading federal court case of Leonardi v. Chase National Bank, 81 F.2d 19 (2d Cir. 1936) cited the 1871 case of Manufacturers National Bank v. Baack, 16 Fed. Cas. 671 (no. 9052) (C.C.S.D.N.Y.) for the proposition that a national bank is established, and thus may be sued, only at the location recited in its charter.

Baack, however, does not support that decision because it was decided prior to the 1927 and 1933 amendments permitting national banks to conduct business at more than one location. Those amendments,

> "considered together with the legislative history and changed factual basis, indicates strongly that, as a national banks general business could now be conducted in more than one location, Congress intended that a national bank could be 'established' in places other than its charter location." Note, An Assault On The Venue Sanctuary Of National Banks, 34 Geo. Wash. L.Rev. 765, 770 (1966).

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), although apparently holding for the proposition that national banks may be sued only in the county in which the bank is located (i.e. established), is not a reliable authority because the Court did not attempt to reexamine the definition of "location" of a national bank, and those cases cited by the Court to support its decision were not authoritative because they were either decided prior to the amendments, or are not in point. Decisions relying on Mercantile National Bank, such as Staley v. Homeland, Inc., 368 F.Supp. 1344, (E.D. N.C. 1974), are similarly flawed for their mechanical application of the special venue statute.

The oppressive interpretation that this section is subject to is based upon outmoded thinking which has not escaped attention. The American Law Institute has stated that

> "There is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purposes of venue",

and has therefore recommended, by unanimous votes of its Council, that the special venue provisions for national banks be repealed, and that they be treated for purposes of venue as any other corporation. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, 77, 413 (1969).

In the words of Grant Gilmore, in commenting on statutory obsolescence in the area of commercial law,

> "a 1850 codification . . . would have been a disaster in fact because few of the propositions which had seemed true in 1850 . . . had survived until 1900 in anything like recognizable form." Gilmore, On Statutory Obsolescence, 39 Colo. L. Rec. 461, 464 (1967).

In other words, Cessant ratione legis,

cessat et ipsa lex (when the reason for the law ceases, the rule itself ceases).

D. THIS PETITION FOR A WRIT OF CERTIORARI MUST BE HEARD.

By denying Plaintiff's motion raising the question of venue, the decision below falls into a class composed of "ancillary order which determine substantial rights of the parties which, if not promptly reviewed, will subject the party to irreparable harm". United States v. McWhirter, 376 F.2d 102, 105 (5th Cir. 1967). In its numerous decisions in this area, this Court has noted the considerations involved in determining whether an order is final, and thus reviewable on appeal. The decision in Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) acknowledges that

> "The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final'. (Citations) . . . A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure."

Dickinson v. Petroleum Conversion Corp., 378 U.S. 507, 511 (1950) pointed out that in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review

on the one hand and the danger of denying justice by delay on the other." As has been stated, if these dictates of the Supreme Court are to rule the instant case this Petition for Writ of Certiorari must be heard by this Court before Petitioners lose finally and irreparably the right to have the venue question litigated at the only time it has any legal significance to any of the parties. If this Petition will not lie, Wellham and Channing-Hamilton Corporation will undoubtedly be compelled to prosecute their cause of action against ten defendants in three different United States District Courts, all of said prosecution occurring before Plaintiff's rights to challenge the validity of any venue transfer order accrues to them.

CONCLUSION

The issues involved are of considerable national importance. Whether the special venue provision of the Clayton Act supersedes the venue provision of the National Banking Act is a question of first impression.

For the foregoing reasons, the petition for certiorari should be granted.

Dated: August 30, 1977

Respectfully submitted,

EVANS, MAHAN & WALLERSTEIN

By: GUY C. EVANS

Attorneys for Petitioners

APPENDIX

[Pages 1a-1c]

APPENDIX

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(caption and formal parts omitted)

ORDER

Before: Wright and Wallace, Circuit Judges

Upon due consideration, the petition for rehearing is denied.

Filed June 3, 1977

/s/ Eugene A. Wright
/s/ J. Clifford Wallace
U.S. CIRCUIT JUDGES

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(caption and formal parts omitted)

ORDER

Before: Wright and Wallace, Circuit Judges

The motion to dismiss is granted, and the appeal is hereby dismissed. The order which transferred the action to the Northern District of Georgia is not appealable under 28 U.S.C. §1291, even under the "collateral order" doctrine of Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949). See also Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968).

Filed May 3, 1977 /s/ Eugene A. Wright
/s/ Clifford Wallace
U.S. CIRCUIT JUDGES

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(caption and formal parts omitted)

ORDER OF TRANSFER OF ACTION AS TO DEFENDANT THE CITIZENS AND SOUTHERN NATIONAL BANK

This case having come on for hearing before this Court on June 28, 1976, pursuant to the motion of defendant The Citizens and Southern National Bank pursuant to 12 U.S.C. §94 for an order of dismissal for improper venue, or, in the alternative for an order transferring this case as to defendant The Citizens and Southern National Bank to the United States District Court for the Southern District of Georgia, defendant The Citizens and Southern National Bank having appeared by its counsel, Latham & Watkins, by Robert A. Long, and plaintiffs having appeared by their counsel, Evans, Tull & Mahan, by Guy C. Evans, and good cause appearing:

IT IS HEREBY ORDERED that the motion of defendant The Citizens and Southern National Bank is granted and that this action, insofar as it pertains to the Citizens and Southern National Bank be and hereby is transferred to the United States District Court for the Southern District of Georgia;

IT IS FURTHER ORDERED that the Clerk of the Court transmit those portions of the file in this case that pertain to the Citizens and Southern National Bank to the United States District Court for the Southern District of Georgia.

Dated: July 14, 1976.

/s/ Warren J. Ferguson
United States District Judge